

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

21005

26050

FILE: B-210368.2

DATE: August 23, 1983

MATTER OF: Osawa & Co.

DIGEST:

1. Protest that procuring agency improperly released price and technical data of protester's terminated contract to competitors is untimely when not filed prior to closing date for receipt of proposals on resolicitation following termination.
2. Contracting officer has discretion not to conduct a preaward survey, and in the absence of a showing of fraud or the failure to apply a definitive responsibility requirement, GAO will not review a decision not to conduct a preaward survey, nor review the contracting officer's affirmative determination of responsibility. Below cost proposal provides no basis for protest because procuring agency determined that firm is responsible.
3. Unsupported allegation that firm's camera does not meet flashbulb synchronization requirement is denied.
4. Protest that firm obtained competitive price advantage by offering unacceptable camera case as equivalent to brand name is denied because solicitation allowed brand name or equivalent and firm offered brand name and competitive price therefor in the alternative.

Osawa & Co. (Osawa), the protester, was awarded a contract under request for proposals (RFP) No. F42600-82-R-0156 by the Ogden Air Logistics Center, Hill Air Force Base on September 30, 1982, for 60 still picture, general purpose, median format cameras. However, upon discovering that another offeror, Camera Den, had not received an

026463

122177

important amendment regarding specifications, the contracting officer terminated Osawa's contract on November 16, 1982. The requirement was resolicited in RFP No. FD2020-83-25729 for 100 cameras. Camera Den was the apparent low successful offeror. Osawa protests the proposed award of a contract to Camera Den.

We deny the protest in part and dismiss the protest in part.

Osawa protests that Camera Den received a competitive advantage in the resolicitation because the Air Force released the price of the contract awarded to Osawa and may have released details regarding its technical proposal under RFP-0156.

The Air Force denies improperly releasing any information. As to the price of Osawa's contract, the Air Force replies that it was required by Defense Acquisition Regulation (DAR) § 3-508.3 (Defense Acquisition Circular 76-40, November 26, 1982) to so advise unsuccessful offerors, including Camera Den. The Air Force argues that Osawa was not prejudiced by the release of its price for 60 cameras because the quantity of cameras to be procured on resolicitation was increased to 100 cameras. Finally, the Air Force argues that this allegation is untimely filed under our Bid Protest Procedures, 4 C.F.R. Part 21 (1983).

This ground of protest is untimely. The alleged competitive prejudice from the price disclosure and circumstances from which Osawa infers the improper release of technical information were or should have been known at the time of the resolicitation. Osawa was therefore required to protest no later than the February 23, 1983, closing date. 4 C.F.R. § 21.2(b)(1) (1983). However, the protest was not filed here until March 11, 1983.

The Air Force is withholding award of a contract until our resolution of the protest. Osawa should, therefore, be unaware of Camera Den's price. However, Osawa contends it has been advised that Camera Den's price is more than \$100 lower than Osawa's price. Osawa contends that Camera Den cannot meet the contract requirements at such a price and protests that the Air Force did not conduct a preaward survey. Osawa is particularly concerned that Camera Den lacks the facilities necessary to conduct required testing and comply with the identification marking requirement. Osawa contends the Air Force's " cursory " review of Camera Den's responsibility contrasts with the Air Force's previous

review of Osawa's responsibility. The Air Force acknowledges that it did not conduct a preaward survey, yet contends it conducted a thorough review of Camera Den's responsibility. A preaward survey was unnecessary, the Air Force states, because Camera Den has a good delivery and performance record in past sales to the procuring activity.

We have held that a preaward survey is not a legal prerequisite to an affirmative determination of responsibility. Contracting officials have broad discretion regarding whether to conduct a preaward survey and we will not review such a decision absent an allegation of fraud or the failure to apply a definitive responsibility requirement, since the decision is part of an affirmative determination of responsibility. Paramatic Filter Corporation, B-210138, February 24, 1983, 83-1 CPD 187. Osawa's allegations do not warrant our review, under either of these exceptions, of Camera Den's ability to comply with the testing and identification marking requirements. Merchants Rent-A-Car, Inc., B-211934, June 15, 1983, 83-1 CPD 659. Similarly, Osawa's contention that Camera Den cannot comply with the contract at an allegedly below cost price does not provide a legal basis for challenging an award to an offeror which the procuring agency determines is responsible. Whether Camera Den ultimately supplies an item conforming to the contract requirements is a matter of contract administration, which is the responsibility of the procuring agency and not this office. Control Technology Co., Inc., B-210860, March 14, 1983, 83-1 CPD 254.

Osawa protests that Camera Den's camera will not meet the flashbulb synchronization requirement of paragraph 3.6 of the specifications. No further information is provided by Osawa. The Air Force contends the camera will meet this requirement. We conclude that Osawa has not carried its burden of proof and deny this ground of protest.

The solicitation required that offerors provide a Halliburton camera case or equivalent. Osawa's final ground of protest is that Camera Den obtained its price advantage from the fact that Camera Den offered a generic aluminum camera case which the Air Force's technical review staff determined was not equivalent to the Halliburton case. While it is true that Camera Den offered a generic aluminum case as an equivalent, the generic case, as permitted by the solicitation, was offered as an alternative to the Halliburton case in Camera Den's proposal. Camera Den clearly offered both the brand name or a proposed

equivalent and respective prices therefor. The fact that the generic case was not approved as an equivalent did not preclude the Air Force from accepting Camera Den's offer of a Halliburton case. In any event, without being specific as to pricing because of the preaward status of this negotiated procurement, we note that Camera Den's price advantage remains irrespective of which case the agency decided to accept.

The protest is denied in part and dismissed in part.

for *Harry R. Van Cleave*
Comptroller General
of the United States